**BEFORE THE**

**STATE OF CALIFORNIA**

**OCCUPATIONAL SAFETY AND HEALTH**

**APPEALS BOARD**

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| In the Matter of the Appeal of:<br><br>SILVERCREST WESTERN HOMES, CORP.<br>109 Pioneer Avenue<br>Woodland, California 95776<br><br>Employer | Docket No. 03-R2D1-4305<br><br>**DECISION AFTER RECONSIDERATION** |

The Occupational Safety and Health Appeals Board (Board) pursuant to authority vested in it by the California Labor Code, having ordered reconsideration on its own motion, makes the following decision after reconsideration.

## Background and Jurisdictional Information

The Division of Occupational and Health (the Division) cited Silvercrest Western Homes, Corp. (Employer) for a regulatory violation of section 342(a) of Title 8 of the California Code of Regulations[1] because Employer did not report to the Division that one of its employees had been seriously injured in a fall from a ladder on August 23, 2003. Employer appealed from the citation on the specific grounds that the safety order was not violated, that the regulatory classification of the violation is incorrect, and that the $5,000 civil penalty proposed by the Division is unreasonable.

The parties submitted the case for decision based upon written stipulated facts and written briefs.

The "Stipulated Undisputed Facts" are as follows:

1. Martin Guillen is, and at all relevant times was, an employee of Silvercrest Western Homes Corporation.

2. On Saturday, August 23, 2003, Martin Guillen fell from a ladder while changing a light bulb while at work in the welding shop of Silvercrest Western Homes Corporation located at

[1] Unless otherwise noted, all section references herein are to Title 8 of the California Code of Regulations.

109 Pioneer Avenue, Woodland, California 95776 at approximately 11:55 a.m. Immediately thereafter Mr. Guillen was picked up by the Woodland Fire Department and transported to U.C. Davis Medical Center.

3. Mr. Guillen was hospitalized for four days due to injuries he sustained from the accident. Mr. Guillen suffered a reportable injury pursuant to 8 CCR 342(a).

4. Management for the Company did not learn of the accident until arriving for work on Monday morning, August 25, 2003; at which point management was notified of the Fire Department's role in transporting Mr. Guillen to the hospital. After learning about the accident on August 25, 2003, the company's Safety Director, Salvador Perez, immediately began an internal investigation of the accident; however, at no time did the employer report Mr. Guillen's accident to the Division.

5. On Monday, August 25, 2003, the accident was reported to the Division by Rich Thomas of the Woodland Fire Department (first responder) at 9:05 a.m. [reference to an exhibit omitted]. Immediately thereafter, the employer was contacted by the Division regarding the accident.

6. On September 16, 2003, a Cal-OSHA accident investigation was conducted by investigator John Husmann from the Sacramento OSHA District office. The investigator determined that the accident itself was not caused by any unsafe or hazardous work condition but that the employer simply failed to notify the Division of the existence of a serious injury under Labor Code section 6409.1.

7. As such, on October 17, 2003 a Citation and Notification of Penalty was issued by the Division for failure to report pursuant to 8 CCR 342(a) which states:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

8. The employer has a good record with the Division and was given the highest rating of effective for all of its Safety and Health Programs (Safety Responsibility, Employee Participation, Training, PPE, Housekeeping and First Aid). The company received the highest rating

from the Division for its History and Good Faith in its Adjustment Factors and had never previously received a violation for failure to report a serious accident. [Reference to exhibit omitted]

9. Effective January 1, 2003, Labor Code section 6409.1 was amended (AB2837, Chapter 885, Statutes of 2002) to state:

> In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Safety and Health (DOSH) by telephone or telegraph. An employer who violates this subdivision **may** be assessed a civil penalty of not less than $5,000. (emphasis added.)

10. The Division's Policy and Procedures Manual states that for an initial occurrence of failure to report violations an employer who fails to report within 8 hours after the employer knows or with diligent inquiry would have known of the occurrence of the accident **shall** be cited for a failure-to-report violation of 8 CCR section 342(a). (emphasis added.)

11. While the employer contends that the $5,000 fine was unreasonable in light of the circumstances, the penalty was computed in accordance with the Division's Policies and Procedures Manual.

## The Violation

Section 342(a), under which Employer was cited, reads, in its entirety, as follows:

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
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> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.[2]

[2] Section 342(a) implements Labor Code section 6409.1(b), which reads: "[i]n every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Health by telephone or telegraph."

## Issues In The Order Of Reconsideration

In the July 26, 2005 Order of Reconsideration, the Board stated the issues to be considered were:

1. Does the evidence establish that Employer's employee suffered a "serious injury" within the meaning of Labor Code section 6302(h) for purposes of establishing that Employer was obligated to report the injury pursuant to section 342(a)?
2. If a violation of section 342(a) is found:
   (a) Does Labor Code section 6409.1 require assessment of a civil penalty?
   (b) Does Labor Code section 6409.1 require that an assessed civil penalty be not less than $5,000?
   (c) Is section 336(a)(6) of the Director's Regulations binding on the Board?
3. Does the Appeals Board have the authority to reduce the $5,000 civil penalty proposed by the Division for the violation of section 342(a)?
4. Did the ALJ properly determine Employer's underground regulation defense?
5. Was the "diligent inquiry" analysis properly applied to determine the alleged violation's existence and to decide the reasonableness of the proposed penalty?

The Board issued the referenced Order prior to our decision in *Bill Callaway & Greg Lay dba Williams Redi-Mix,* Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006). As will be seen below, some of the issues the Board raised in the Order were resolved in *Callaway*. The remainder are addressed below.

In reaching this Decision After Reconsideration the Board has fully reviewed the record in this case, the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the parties' respective answers to the Order.

## Issue 1: Was there a "serious injury" reportable per section 342(a)?

Issue 1 was answered in the "Stipulated Undisputed Facts." According to them an employee of Employer, Martin Guillen, sustained a serious injury[3]

[3] Labor Code section 6302(h) and Title 8, California Code of Regulations section 330(h) define "Serious injury or illness" to mean "any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway."

at Employer's place of employment on August 23, 2003 at approximately 11:55 a.m.

Although Employer's defense implies no serious injury was established, the parties stipulated Guillen suffered a reportable injury pursuant to section 342(a). We therefore sustain the ALJ's decision rejecting that defense, and a violation of section 342(a) is found.

**Issues 2 and 3: Penalties under Labor Code section 6409.1 and the Board's authority**

The Board's decision in *Callaway, supra,* addressed the questions asked in Issues 2 and 3 above. In *Callaway* we discussed at length substantially all the issues raised by employer relating to the interaction of Labor Code section 6409.1 with the Director's regulation set forth in section 336(a)(6). Further, *Callaway* is dispositive on whether the Board is obligated to assess a minimum $5,000 penalty in this case. *Callaway* held that when a violation of section 342(a) is established the Board has authority to assess a civil penalty of less than $5,000, or no penalty at all if the circumstances so warrant; and that section 336(a)(6) of the Director's Regulations does not bind the Board.[3]

**Issue 4: Did the ALJ correctly resolve the "underground regulation" defense?**

The Division's Policy and Procedures Manual (PPM) directs field personnel to issue a citation for every section 342(a) violation regardless of the circumstances. Employer argues, that by applying the PPM provision in all section 342(a) cases, the Division is enforcing a "regulation" that is "underground" or unlawful because it was not adopted in accordance with the Administrative Procedures Act (APA) (Government Code §§ 11340 et. seq.).

That argument does not take into account Director's Regulation section 336(a)(6), effective January 30, 2003, which states, "Any employer who fails to timely report an employee's injury or illness, or death, in violation of section 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of $5,000." Since section 336(a)(6) was duly adopted pursuant to the Administrative Procedure Act and was in effect before the alleged violation occurred, we find no evidence of an underground regulation.

**Issue 5: Was the "diligent inquiry" analysis correct and a reasonable penalty assessed?**

Employer learned on Monday that Guillen had been injured on Saturday

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[3] *Callaway* in effect answered the questions posed in the Order of Reconsideration in this case as follows: 2(a) no; 2(b) no; 2(c) no; and 3 yes.

because no one from management was present at the worksite when the accident occurred. The ALJ's Decision found Employer had violated the section 342(a) reporting requirement because it did not report the injury. The ALJ then made a "diligent inquiry" analysis of the circumstances of that failure to report in order to determine what penalty was appropriate.

Analysis of the circumstances under which the violation occurred is necessary to determine whether a civil penalty should be imposed for the section 342(a) violation and, if so, in what amount. This includes considering such factors as the Employer's effort to comply, what factors prevented or interfered with compliance, and the extent and nature of the compliance failure.

In view of our *Callaway* decision, *supra*, which was issued after the Decision in this case, the ALJ's "diligent inquiry" analysis is not applicable.[5] The factors considered in a diligent inquiry analysis can now be used to determine whether section 342(a) was violated and to the penalty to be assessed if a violation is found. Applying our analysis in *Callaway* to the facts here, we note Employer had no process in place whereby its employees were to notify management of accidents which occurred when management was absent from the workplace and no person was designated to make a report to the Division. Although one of its employees called the fire department, management was not made aware of the injury for nearly 48 hours, nor was the Division. An employer is not relieved of the responsibility to comply with safety or health related regulations or orders because management is absent from the workplace. The Woodland Fire Department made a report on Monday; the same day Employer's management became aware of the injury. Although the safety director began an internal investigation of the accident he never reported the injury to the Division. The stipulated facts provide no finding of unsafe conditions, just that Employer never notified the Division. Employer objects to the $5,000 fine as being unreasonable but raises no defenses to the violation itself.[6]

We have held that all California employers have an affirmative duty to stay current with the safety standards, orders, and regulations affecting their operations. (*McKee Electric Company*, Cal/OSHA App. 81-0001, Denial of Petition for Reconsideration (May 29, 1981).) The Division stipulated that Employer had numerous safety programs in place, a good safety record and no prior violations. While this is commendable, we cannot ignore the fact that Employer made no effort to even make a report to the Division.[7] This

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[5] Because the ALJ was analyzing this matter before *Callaway* was decided by the Board, he was deciding whether the circumstances would warrant a zero penalty, as opposed to the $5,000 proposed by the Division.

[6] Challenging the penalty amount places the circumstances of the violation at issue, even if the violation itself is established by operation of law. *System 99, A Corporation*, Cal/OSHA App. 78-1259, Decision After Reconsideration (Aug. 30, 1982).

[7] The stipulated facts state the Division told Employer of the injury on Monday. It is understandable that having been informed by the Division that the Division already knew of the accident, Employer believed it

Employer's circumstances therefore are not the same as those of an employer which files a report, albeit late. Further, the stipulated facts make no mention of Employer inquiring into the employee's injuries or the status of his hospitalization. Concern for the employee's well being should be one of an employer's greatest concerns.

In *Callaway, supra,* we said, "[a]ssessing a fixed minimum $5,000 penalty would place this Employer in the same category as employers who *purposely* decline to report a serious work-related injury at all. Indeed, such result creates a *disincentive* for reporting serious work-related injuries. The employer is faced with the choice of reporting the injury late and facing a certain $5,000 fine, or not reporting it at all, hoping that the Division never finds out. Logically, many employers faced with a similar choice would opt not to report, defeating the purpose behind the reporting requirement, preventing the Division from quickly inspecting an accident location to determine if any hazards to other employees remain, and frustrating the objectives of the Cal/OSHA Act."

Here, Employer learned of the injury from the Division on the Monday following the accident. Employer had an option to file a report but, for reasons undisclosed did not.[8] According to the Division, Employer was in compliance with other safety regulations. It is logical to assume that Employer's conversation with the Division was believed to be compliance. However, the stipulation did not address that issue. The Division's investigation was not commenced for 3 weeks. The Division did not allege its investigation was delayed by Employer's failure to report.

We have held that employers which follow safe practices should not be penalized but rather should be rewarded for their practices that help to protect employees. Here, the Division affirms Employer was not at fault for the accident and instead employed good safe practices.

We find that Employer failed to report the injury as required by section 342(a). However, Employer otherwise had safe practices in effect and the penalty here should reflect same. And while we find that Employer failed to fulfill its reporting obligation under section 342(a), there is no evidence that Employer intentionally failed to report the accident. Taking all the factors into consideration, we reduce the penalty by $1,500.

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was unnecessary to call the Division to re-report the event. Our penalty assessment reflects this consideration.

[8] Employer may have reasoned that since the Fire Department had already reported the accident to the Division no further report was necessary. If so Employer did not appreciate that the law requires *both* employers and first responders to report to the Division. The Legislature has imposed a non-delegable duty on the employer, as well as any state, county or local fire or police agency that is called to an accident scene, to report a serious-injury accident. (*Steve P. Rados, Inc.*, Cal/OSHA App. 97-575, Decision After Reconsideration (Nov. 22, 2000); §§ 342(a) and (b) and Labor Code Sections 6409.1(b) and 6409.2). This consideration is distinct from that in footnote 7 above, although both deal with duplicate reports.

## DECISION AFTER RECONSIDERATION

Under the facts of this case a penalty of $3,500 is appropriate. The citation is established and the penalty is modified as indicated above and Employer is ordered to pay a $3,500 civil penalty.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 20, 2007